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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADFORD DYEING ASSOCIATION (U. S. A.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 644–665) are reported in 4 N. L. R. B. 604. The supplemental findings of fact and recommendation of the Board (R. 675–677) are reported in 8 N. L. R. B. 979. The opinion of the Circuit Court of Appeals (R. 683–691) is reported in 106 F. (2d) 119.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 2, 1939 (R. 691). A petition

for rehearing filed by the Board was denied on September 13, 1939 (R. 691). The petition for certiorari was filed on December 13, 1939, and was granted on January 15, 1940 (R. 692). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act is applicable to respondent, a corporation engaged in the business of processing large quantities of materials belonging to others, where the major portion of the materials to be processed are shipped to respondent from states other than that in which its plant is situated and the major portion of the finished product is likewise shipped into other states.

2. Whether there was substantial evidence to support the findings of the Board that respondent had dominated and interfered with the formation and administration of a labor organization of its employees and had coerced its employees to join that organization in violation of Section 8 (1) and (2) of the Act.

3. Whether, upon findings that respondent had dominated and interfered with the formation and administration of a labor organization of its employees and had coerced its employees to join that organization, it is within the power of the Board to order respondent to withdraw all recognition

from and completely disestablish the organization as a representative of its employees for collective bargaining, or whether as a prerequisite to such an order it was necessary for the Board to hold an election in which the labor organization ordered disestablished should appear upon the ballot.

4. Whether there was substantial evidence to support the findings of the Board that a certain labor organization had been designated as bargaining representative by a majority of respondent's employees, and that respondent had violated Section 8 (5) of the Act in refusing to bargain with that organization.

5. Whether there was substantial evidence to support the findings of the Board that two employees were discharged for union activity, in violation of Section 8 (3) of the Act and, if so, whether the court below, upon its view of the evidence concerning their subsequent conduct, was warranted in setting aside the Board's order of reinstatement with back pay.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 80–83.

STATEMENT

Amended charges having been filed by the Textile Workers' Organizing Committee of the Congress of

Industrial Organizations (R. 8–9), a labor organization herein called the T. W. O. C., the National Labor Relations Board on June 30, 1937, issued its complaint and notice of hearing, which were served upon respondent (R. 9–13). The complaint alleged, in substance, that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), (3), and (5), and Section 2 (6) and (7) of the Act, by discharging and refusing to reinstate two named employees because of their activity in behalf of the T. W. O. C., by forming, urging membership in, and supporting a labor organization known as Bradford Dyeing Association Employees' Federation, herein called the Federation, and by refusing to bargain collectively with the T. W. O. C., the majority representative of the employees in an appropriate unit (R. 9–12).[1] Respondent answered (R. 18–21), reserving jurisdictional objections stated in a special appearance and motion to dismiss (R. 14–15),[2] and denying that it had engaged in the unfair labor practices alleged. A hearing was held from July 12 to July 16, 1937, before a Trial Examiner of the Board, at which the Federation intervened (R.

[1] The complaint was amended at the hearing to conform to the proof in minor respects not here material (R. 295–296, 483).

[2] This motion, together with a motion for a partial dismissal and a motion for a bill of particulars (R. 15–17), was denied by the Trial Examiner (R. 27–28, 29–30, 129–130, 350, 586). His rulings were affirmed by the Board (R. 645–646).

21–23, 27). On October 16, 1937, the Trial Examiner filed an Intermediate Report (R. 583–602), containing his findings and recommendations, to which exceptions were filed by respondent (R. 602–631) and the Federation (R. 631–641). On December 22, 1937, the Board issued its decision setting forth its findings of fact, conclusions of law, and order (R. 644–665).

The Board's findings with respect to the unfair labor practices of respondent may be briefly summarized as follows:[3]

About ~~May~~ 27, 1937, two of respondent's employees, Nelson and Schofield, initiated a movement to enlist their fellow workers in the T. W. O. C. (R. 649). They procured and distributed membership cards, and by April 4 a majority of the production and maintenance employees, a unit found appropriate by the Board (R. 658), had designated the T. W. O. C. as their bargaining representative (R. 649, 658). On April 4 and at all times thereafter the T. W. O. C. was the authorized representative of all such employees (R. 660, 662). On April 3 respondent laid off and thereafter refused to reinstate Nelson, and on April 6 discharged Schofield, because of their activity in behalf of the T. W. O. C. (R. 652, 654). In thus discriminating against Nelson and Schofield by reason of their union activity, respondent violated Section 8 (1) and (3) of the Act (R. 654, 662).

[3] The evidence supporting these findings will be discussed in the Argument, *infra*, pp. 17–78.

On April 6 various employees selected by their supervisors met in respondent's offices, were told by Summersby, respondent's president, that respondent would not recognize the C. I. O., and were advised to form an inside union (R. 655). After Summersby left the office, the men opened certain packages which they found in the office, and which were found to contain Federation membership cards and circulars attacking the T. W. O. C. and appealing for the formation of "our own bargaining agency" (R. 655). A campaign for membership in the Federation was then undertaken, marked by solicitation, in part by supervisory employees, and organization meetings on company time and premises (R. 655–657). During this period respondent continued its expressions of hostility to the T. W. O. C. and its appeals for a local union (R. 655–657). By April 9 a majority of the employees had joined the Federation, and respondent accorded it exclusive recognition upon that date (R. 656). Respondent participated in, dominated, and interfered with the formation and administration of the Federation and by intimidation and coercion compelled its employees to join it, all in violation of Section 8 (1) and (2) (R. 657–658, 662).

On April 2, and at all times thereafter, respondent informed its employees that it would not recognize or deal with the T. W. O. C., and at all times after April 4 respondent refused to bargain col-

lectively with the T. W. O. C., in violation of Section 8 (5) of the Act (R. 658–660, 663). Respondent's unfair labor practices in organizing and fostering the Federation, and in persuading, intimidating, and coercing the employees to join it, could not operate to destroy the exclusive bargaining status of the T. W. O. C., the representative previously selected by the untrammelled will of the majority (R. 660–662).

Upon the basis of these findings of violations of Section 8 (1), (2), (3), and (5) of the Act, the Board ordered respondent to cease and desist from its unfair labor practices and, as affirmative action found necessary to effectuate the policies of the Act (R. 661–662), to offer Schofield and Nelson immediate reinstatement with back pay, to withdraw recognition from and completely disestablish the Federation as a bargaining representative of the employees, to bargain collectively with the T. W. O. C., upon request, as the exclusive representative of the employees in the appropriate unit, and to post appropriate notices (R. 663–665).

On April 5, 1938, the Board, pursuant to Section 10 (e) of the Act, filed in the court below a petition to enforce its order (R. 1–6). On April 14, 1938, upon a motion by respondent seeking to adduce additional evidence before the Board upon the question whether, assuming Nelson had not been discharged in April, he nevertheless would

have been laid off subsequently, the court ordered that such evidence be adduced (R. 666–667, 676). By stipulation (R. 666–667), affidavits were received in lieu of a further hearing and were considered by the Board (R. 667–674). On August 30, 1938, the Board issued its supplemental findings of fact and recommendations on the evidence so taken (R. 675–677).[4] On September 6, 1938, the Board's supplemental findings and recommendations were filed in the court below (R. 674).

On August 2, 1939, the court handed down an opinion (R. 683–691) vacating certain portions of the Board's order and failing to enforce those portions not vacated. The court stated its ultimate disposition of the case as follows (R. 690–691):

> If the case should not be dismissed for lack of jurisdiction, we are of the opinion that the order of the Board that these two men shall be reinstated, is not warranted by the Act or the evidence before the Board, and must be vacated; and as no election has been held, that the Board should order an election by the employees to determine which group, [the T. W. O. C. or the Federation] if either, they will select to represent them in labor disputes between themselves and the respondent.

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[4] The Board found that the evidence did not establish that Nelson would have been laid off for lack of work in September 1937 if he had not been discriminatorily discharged in April of that year (R. 676–677; see pp. 75–78, *infra*).

> Until a new election has taken place by order of the Board, and the employees have expressed their preference as to what group or body shall represent them in any labor disputes between them and the respondent, the order of the Board, except as to paragraphs 1, 2, and 3 of the cease and desist portion of the order, and the entire paragraph 5 ordering affirmative action shall be vacated, the Board then to proceed in accordance with this opinion.

On the same date the court entered a decree, in the terms of the last paragraph of the opinion, which fails to enforce any part of the Board's order (R. 691). On September 13, 1939, the Board's petition for rehearing was denied without opinion (R. 691).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In not holding that respondent is subject to the National Labor Relations Act.

2. In holding that there was not substantial evidence to support the Board's findings that Nelson and Schofield were discharged because of their union activity, and that the T. W. O. C. had been designated as bargaining representative by a majority of the employees in an appropriate unit.

3. In refusing to enforce the provisions of the order requiring respondent to withdraw recognition from and completely to disestablish the Federation.

4. In refusing to enforce the provisions of the

Board's order requiring respondent to bargain collectively with the T. W. O. C.

5. In holding that an election with the Federation on the ballot is a prerequisite to enforcement of the directions to bargain with the T. W. O. C. and to disestablish the Federation.

6. In finding that Nelson and Schofield had engaged in misconduct subsequent to their discharges which rendered the Board's reinstatement order improper.

7. In setting aside paragraphs 4 and 5 of the Board's order and in refusing to enforce the order in full.

SUMMARY OF ARGUMENT

I

Substantial quantities of unfinished textile goods owned by others move across state lines to respondent's plant, where they are dyed and finished, and are then shipped by respondent, at the direction of its customers, to consignees in other states. This extensive interstate commerce to and from respondent's plant would be burdened and interrupted by industrial strife between respondent and its employees. The Act is therefore applicable to respondent. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

II

The Board's findings that respondent dominated and interfered with the formation and administra-

tion of the Federation in violation of Section 8 (1) and (2) of the Act are supported by substantial evidence. In opposition to the organizational activity of the T. W. O. C., respondent took the lead in assembling a "committee" which formed the Federation. Respondent's president, by repeatedly announcing that he would not recognize the T. W. O. C. and by extolling the advantages of an "inside" union, promoted the Federation's membership drive, as did solicitation on company time by supervisory employees and others. As a result of respondent's strong and continuous pressure upon the employees, a majority of them joined the Federation, which was immediately granted exclusive recognition by respondent. Upon such findings, the order requiring respondent to cease and desist from its domination and interference and to disestablish the Federation as a bargaining representative was valid and should have been enforced by the court below. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *National Labor Relations Board* v. *Newport News Shipbuilding & Drydock Co.*, No. 20 this Term, decided December 4, 1939. The view of the court below that an election with the Federation on the ballot was a prerequisite to enforce-

ment of the disestablishment order is erroneous. *National Labor Relations Board* v. *The Falk Corporation*, No. 460, this Term, decided January 2, 1940.

III

The Board's findings that respondent violated Section 8 (5) of the Act by refusing to bargain collectively with the T. W. O. C. are supported by substantial evidence and the order requiring such bargaining is entitled to enforcement.

1. A majority of respondent's employees in an admittedly appropriate bargaining unit designated the T. W. O. C. as their representative. Respondent's contention that the T. W. O. C. application cards signed by the employees did not constitute a designation of that organization as their representative is without merit.

2. Respondent refused to bargain with the T. W. O. C. upon the express and single ground that exclusive recognition had already been granted to the Federation. Having based its refusal on that ground, respondent may not now defend its refusal upon an alleged ignorance of the T. W. O. C.'s majority representation. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Art Metal Construction Co.* v. *National Labor Relations Board*, decided February 26, 1940 (C. C. A. 2d); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th).

3. The Federation's purported representation of a majority of the employees did not justify respondent's refusal to bargain with the T. W. O. C. That majority was obtained as a direct result of respondent's violations of Sections 8 (1) and (2) of the Act and cannot be given weight Cf. *National Licorice Co.* v. *National Labor Relations Board*, No. 272, this Term, decided March 4, 1940. The Federation was a selection made as a consequence of unfair labor practices and its purported designation is not inconsistent with a continued free designation of the T. W. O. C. by a majority of the employees. Unfair labor practices cannot operate to change the freely selected bargaining representative. *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6th). Such a representative retains its status until the employees reject it of their own volition. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. The *Railway Clerks* case and applicable administrative precedents were before Congress when the Act was adopted and fully support the Board's view that the claimed destruction of the T. W. O. C.'s majority did not relieve respondent of its duty to bargain with that organization.

4. The order requiring respondent to bargain with the T. W. O. C. is an appropriate remedy for the refusal to bargain and should be enforced without regard to asserted changes in representation occurring after the refusal. The decisions denying enforcement to or modifying bargaining orders be-

cause of doubts concerning representation at the time of review (*National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2d), modified and affirmed, No. 272, this Term, decided March 4, 1940; *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2d), petition for certiorari pending, No. 664, this Term; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th)) are erroneous. The effect of an illegal refusal to bargain is to drive employees away from their chosen representative and to create a continuing obstacle to a free choice. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. These effects cannot be corrected merely by enforcing the cease-and-desist order; the only effective remedy is to require a grant of the withheld recognition. Further, the decisions giving weight to assertions of a loss of majority after an unremedied refusal to bargain (the *National Licorice*, *American Manufacturing*, and *Hamilton-Brown* cases, *supra*) prevent effective administration of Section 8 (5) by necessitating successive inquiries which may delay indefinitely any bargaining order.

It is not true that the order as drafted can saddle upon the employees a representative not wanted by a majority. The procedure under Section 9 of the

such a result. Hence, the sole issue here is whether a new question of representation must be determined before the unfair labor practices have been effectively remedied, or whether it should be permitted to wait, as the Board believes it should, until conditions permitting a free choice have been reestablished by remedying the violations of the Act here involved. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

The decisions holding that asserted changes in representation after a refusal to bargain are immaterial to the validity of the bargaining order are correct. *International Association of Machinists* v. *National Labor Relations Board*, decided November 20, 1939 (App. D. C.), petition for certiorari pending, No. 732, this Term; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, No. 105, this Term. The order requiring respondent to bargain with the T. W. O. C. effectuates the policies of the Act and should be enforced.

IV

1. The Board's findings that respondent discharged Nelson and Schofield, the T. W. O. C. leaders, in violation of Section 8 (1) and (3) of the Act are plainly supported by substantial evidence. Respondent's explanations for the discharges were not entitled to be credited by the Board.

2. The asserted efforts by Nelson and Schofield after their discharges, to promote a sit-down strike among respondent's employees, are not established by any convincing evidence and, in any event, do not bring them within *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240. The order requiring reinstatement of the two employees with back pay is proper, despite respondent's other assertions of misconduct on their part. *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3d), certiorari denied, No. 418, this Term; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6th); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3d), petition for certiorari pending, No. 707, this Term.

3. Respondent's contention that Nelson would have been laid off in September 1937 if he had not been discriminatorily discharged prior to that date is not supported by the record, as the Board found. In any event, the claim is irrelevant to the validity of the reinstatement order and is not pertinent in this proceeding. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

ARGUMENT

I

RESPONDENT IS SUBJECT TO THE ACT [5]

The facts upon which the jurisdiction of the Board in this case is based are not in dispute. Respondent is engaged in the business of dyeing and finishing textile piece goods at its plant in Bradford, Rhode Island (R. 646–647; 9–10, 18, 37). It employs some 700 persons (R. 647; 50–52)[6] Its customers, more than 90 per cent of whom are located outside Rhode Island (R. 41, 46; see R. 647), purchase unfinished cloth from textile mills in various parts of the country and ship it by truck and railroad to the plant of respondent for processing (R. 647; 37, 41–44, 61, 63). Respondent processed some 57,000,000 yards of cloth during 1936 and 29,000,000 yards during the first six months of 1937; more than 50 percent of this quantity was shipped to its plant across state boundaries (R. 647; 43–46, 68). Respondent also purchased colors and dyestuffs during 1936 at a cost of over $350,000, and more than 40 percent of these products came from points outside the State (R. 648; 64–65). Approximately 90 percent of the 86,000,000 yards of

[5] The court below indicated that it was strongly of the view that the Board did not have jurisdiction (R. 683–691). Its failure to enforce those portions of the Board's order which it did not vacate (*supra*, pp. 8–9) might be regarded as a holding that the Act does not apply to respondent.

[6] Respondent's plant is of medium size, compared to other dyeing and finishing plants in the United States (R. 50).

cloth finished by respondent during 1936 and 1937 was shipped from its plant to consignees located outside the State (R. 647; 46–49, 57–58, 63). The customers retain title to the goods at all times during the finishing process, and the finished cloth is shipped out pursuant to their instructions (R. 647; 38–39).

During 1936 respondent sold for its own account more than 588,000 yards of remnants, a by-product of the processing operations; more than 90 per cent of this amount was shipped by respondent out of the State (R. 647; 47, 67–68, 70). Respondent maintains an office in New York City where it employs a number of persons engaged in the solicitation of business (R. 646; 40–41, 68–69).

During 1929 respondent's plant was shut down for a month or six weeks because of a labor dispute, and normal operations were not resumed for about six months (R. 648; 61–62). During that period the shipment of goods in interstate commerce to and from respondent's plant was necessarily decreased or stopped entirely (R. 648; 62).

The Board found that the unfair labor practices involved in this case, occurring in connection with the business operations of the respondent above described, have a substantial relation to commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce (R. 660–661).[7]

[7] The dyeing and finishing industry, of which respondent is an important member, is a bottleneck for the textile in-

These facts, we submit, bring this case within the principles declared by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; they are indistinguishable in any material aspect from the facts to which those principles were applied in sustaining the Board's jurisdiction in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601. In the latter case, as here, the employer was engaged in processing goods to which it did not have title. This Court upheld the jurisdiction of the Board because of the interstate commerce involved in the transportation of goods to be processed across state lines to the factory of the employer and in the transportation of the finished product to points outside the state. The amounts of commerce involved in the present case are far more substantial (were that material) than those affected by the unfair labor practices in the *Fainblatt* case.*

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dustry between the producers and consumers of cloth, and a stoppage of operations in the processing plants would widely affect the flow of commodities in interstate commerce (R. 647; Bd. Exh. 9).

* The court below distinguished the *Fainblatt* case on the ground that there a strike had to some extent reduced the flow of goods in commerce to and from the employer's plant (R. 687). But the Board's jurisdiction need not await an actual obstruction to the flow of commerce sought to be protected; that argument was made and rejected in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 204, 222. It was foreclosed by this Court's decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42–43. See also Section

II

THERE IS AMPLE EVIDENCE SUPPORTING THE BOARD'S FINDINGS THAT RESPONDENT DOMINATED AND INTERFERED WITH THE FORMATION AND ADMINISTRATION OF THE FEDERATION IN VIOLATION OF SECTION 8 (1) AND (2) OF THE ACT. UPON THESE FINDINGS, THE CORRESPONDING PROVISIONS OF THE ORDER WERE VALID AND SHOULD HAVE BEEN ENFORCED

The Board found that respondent dominated and interfered with the formation and administration of the Federation in violation of Section 8 (1) and (2) of the Act (R. 657–658, 662). It appears necessary to show that these findings are supported by evidence for the reason that, while the opinion below assumes that there was some basis for them (R. 687, 688), the court did not enforce the corresponding cease and desist provisions of the order

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2 (7), *infra*, p. 80. As a matter of fact, however, commerce to and from respondent's plant was interrupted by a strike in 1929 (R. 61–62).

It is likewise no answer to point, as the court below did (R. 687), to the possibility that the flow of interstate commerce might not be interrupted because respondent's customers could ship their goods elsewhere in the event of a shutdown of respondent's plant. That argument was made in the *Jones & Laughlin* and companion cases (see *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Company*, 301 U. S. 58, at 66–67), although not noticed in the opinions. The Act exercises a preventive power; it is designed to safeguard the free flow of commerce in its regular and normal channels, and even a diversion of the flow constitutes a burden upon commerce within the constitutional concern of Congress. Compare *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 244–245. See also *McCall* v. *California*, 136 U. S. 104, 111.

and vacated the affirmative requirements of disestablishment[9] and posting of notices (R. 690–691).

The T. W. O. C. membership drive began on March 29, 1937, when Schofield and Nelson, two of respondent's employees, began the distribution of cards among the other employees; their efforts met with instant success (R. 74–78, 90–91, 131–132, 152–153). Simultaneously, respondent threw the full weight of its influence in favor of an "inside" union, a device not thought of so long as the employees did not exercise their rights of self-organization. On April 2, Silvia, respondent's employment manager (R. 476), accused Nelson of being "a ringleader of the C. I. O.," inquired which employees were active in the T. W. O. C. drive, and stated that Summersby, respondent's president, would like to talk to such employees (R. 132–133).[10] During a conversation later that day between Schofield and Nelson on one hand, and Summersby on the other, Summersby stated that he was opposed to "outside" unions and that the employees should not contribute to the support of union "big shots" but should "have a union of our own in the shop" (R. 78–79, 134). Summersby did not deny having made these remarks.[11]

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[9] The court vacated these affirmative provisions subject to a subsequent election. The impropriety of this action is discussed *infra*, pp. 29–30.

[10] The testimony is Nelson's; Silvia did not testify.

[11] During the afternoon of April 2, Summersby met with a committee of "jiggers" in an effort to adjust the wage rates

On that same afternoon, Summersby summoned Nelson to his office, expressed doubt whether there was any "need" of any kind of a union, stated that he favored formation of an inside union in lieu of sending money to outsiders, and promised "the best cooperation" in such a venture (R. 135–136). Summersby urged that Nelson propose formation of a shop union to the T. W. O. C. employees' committee, which was to meet that night (R. 137). On the following morning Summersby again called Nelson to his office and inquired whether Nelson had decided to "cooperate with an outside organization" or "to cooperate with me for a local union?" (R. 139). When Nelson refused to give a definite answer, Summersby laid him off for 2 weeks (R. 140–141, 399–400). The Board found that this layoff, which in fact was a discharge, violated Section 8 (1) and (3) of the Act (*infra*, pp. 60–65). The T. W. O. C.'s efforts to organize the plant nevertheless continued, a well-attended mass meeting being held on April 4 (R. 81). On Tuesday, April 6, Schofield, co-leader with Nelson of the T. W. O. C. drive, was likewise discharged under circumstances which clearly establish that his union activities were the cause, as the Board found (*infra*, pp. 66–70).

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paid to that class of employees (R. 79–80, 446–447). According to Schofield, a member of the committee, Summersby said that he "wouldn't even recognize an outside union * * * and it would be a lot better if we had a union of our own" (R. 80–81).

Coincident with this elimination of the two outstanding leaders of the "outside" union's membership campaign, Summersby took definitive steps to establish an inside union as the representative of the employees. On April 2 Summersby summoned to his office some 12 to 14 employees, selected by respondent from the various departments of the mill (R. 172, 182–183, 473). Silvia, the employment manager (R. 476), and Hopwood, head of the dyeing department (R. 362, 375), instructed two of this group to attend (R. 171, 182). Summersby told the employees thus brought together that he would not recognize the C. I. O. and that it would be to the advantage of all concerned if the employees formed a union more to his liking.[12] Resting on a table in Summersby's office when the employees entered was a package in which were application

[12] Four employees present at this meeting testified concerning Summersby's remarks. Harwick testified that Summersby said "that he wouldn't recognize the C. I. O. and that it would be much better for us to join our own union than to be bothered with this C. I. O." (R. 172 178, 179). The testimony of Oliver, and of Potter, financial secretary of the Federation (R. 215), is to the same effect (R. 183, 216). Upon the basis of Summersby's declarations at this and later meetings, DeFanti, a member of the executive board of the Federation and respondent's witness (R. 429), testified that in his organizational activities on behalf of the Federation he told the employees that Summersby would not deal with the C. I. O. (R. 430–431, 436–438). Pawson, respondent's vice president (R. 60), testified that Summersby said "that he would prefer to deal with a union of his own employees rather than to have to deal with outside influences such as Mr. Sirocco, etc." (R. 358).

cards for membership in the "B. D. A. Employees' Federation" (Bd. Exh. 18, R. 515) and a circular signed "Committee for Organization of the B. D. A. Employees' Federation" (R. 173, 180, 183).[13] No such organization existed.[13a] The circular (printed at pp. 84–85, *infra*) contained a virulent attack on outside unions, a statement that respondent was "not inclined to bargain with outside agitators," and a plea for immediate organization of "our own bargaining agency." The employees present at the meeting in Summersby's office did not know where this printed material came from (R. 180, 181–182, 184, 211), respondent shed no light upon its origin, and the Board, for reasons indicated in the testimony (*e. g.*, R. 186–187), was not able to adduce evidence on the point.

Having set the group upon the course respondent desired, Summersby left his office (R. 174, 183). The group thereupon selected temporary leaders (R. 174, 183–184, 216–217; Bd. Exh. 20) and began

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[13] The circular was omitted from the printed record pursuant to stipulation of the parties (R. 680–681, 692). We have printed it in Appendix B to this brief (*infra*, pp. 84–85).

[13a] Potter, an officer of the Federation, testified that prior to the Federation's first general meeting, held on April 23, there was no temporary committee of any kind (R. 215, 222–223), so that the "Committee for Organization of the B. D. A. Employees' Federation," whose signature appeared on the circulars (*infra*, p. 85), appears to have been merely respondent's label for the group it summoned to Summersby's office.

open distribution of the cards and circulars throughout the plant (R. 177–178, 254, 191, 197, 220–221). Supervisors with the power to discharge actively participated in this distribution on the day of the meeting and during the succeeding days (R. 191–192, 193, 197–198, 201–203, 204, 221–222, 247, 267, 272, 391). Copies of the circulars were posted on bulletin boards in the various departments (R. 221).

Respondent maintained intimate contact with the "committee" it had created, to the point of adding to its membership. Some of the employees working in the "grey room" expressed reluctance to join the Federation because there was no employee from among them at the first meeting (R. 208). After the day shift ceased work on April 6, Silvia, the employment manager, came to the home of Durfee, one of these employees, and inquired "how deep I was in the C. I. O." Upon being told by Durfee that "I wasn't deep in it," Silvia invited Durfee to come to Summersby's office (R. 207–208).[14] Summersby apologized for omitting a representative of the grey room employees from the morning meeting, reiterated his now routine attack upon the C. I. O., explained that a local union was being formed because he would not recognize the C. I. O. but would recognize an inside union, and inquired whether Durfee "was satisfied with the explanation of what

[14] The testimony is Durfee's; Silvia did not testify.

they intended to do" (R. 208–209). When Durfee replied in the affirmative, Summersby escorted him into a second meeting of the "organizing committee" being held in Summersby's office and thus caused Durfee to be added to the "committee" (R. 209–210, 218). At the same time Summersby repeated that he would not recognize the C. I. O., coupled it disparagingly with sympathy strikes, and stressed the advantages of an inside union (R. 210–211, 219).

On April 7 a mass meeting attended by 150 to 200 employees (R. 175) was held in the plant to advance the Federation's membership drive. Respondent's timekeeper, after inquiring of Employment Manager Silvia, told the employees that they need not deduct time spent at this meeting from their working day (R. 392, 188, 196). Summersby sat on the platform and was among those who addressed the men (R. 176). He stated plainly and unequivocally that he would not recognize the C. I. O. and dwelt upon the advantages offered by the Federation (R. 176–177, 189–190, 193, 258, 283–284, 391).[15] Some time after this meeting, Summersby summoned to his office an employee who had placed a C. I. O. card on his automobile and told him that he could close the plant down.

[15] In view of the overwhelming direct testimony cited in the text, the Board did not credit Summersby's cover-all denial that he had at any time expressed opposition to recognizing the C. I. O. (R. 467).

with consequent hardships to the employees, before he would recognize the C. I. O. (R. 212–214).

Two days after the mass meeting of April 7 respondent achieved its declared objective: the Federation, having obtained a majority, was granted exclusive recognition by respondent (Bd. Exhs. 21, 23, R. 515, 516–517; 223–227, 258–259, *infra.*, p. 37). After publicizing this step (Bd. Exh. 22, R. 516), Summersby inserted a paid advertisement in a local newspaper in order to reassure the townspeople that by forming the Federation and obtaining exclusive recognition for it, the employees had proved that they "were still real citizens" and "were not interested in joining the lawless sit-down strike wave * * *" (R. 477–480; Bd. Exh. 42).[16] In an interview given to the press shortly thereafter, Summersby made a thinly cloaked threat to move respondent's mill if

[16] Respondent's insistent efforts to derive comfort from the claim that formation of the Federation averted a "sit-down" strike, apart from its legal insufficiency as a defense to respondent's violations of the law, is based upon the most flimsy evidence. Pawson, respondent's vice president, testified that on April 8 an employee named Rhodes, in an obviously overwrought and "shaky" condition, ran through the plant urging the employees to "sit down" (R. 356, 357, 359–360, 424–425). Pawson recognized that something was wrong with the man, took him in charge, and finally sent him home with instructions to return to work the next day (*ibid.*). Ashworth, an officer of the Federation, testified that Rhodes was intoxicated and that the Federation intervened, with the result that Rhodes was back at work the next day (R. 272–273, 472). The incident certainly was

there was any renewal of "labor uncertainties" (R. 481; Bd. Exh. 43).[17]

Upon the foregoing evidence, it is clear that respondent interfered with and dominated the formation of the Federation within the meaning of the Act.[18] Respondent originated the Federation as a means of combating its employees' initial immediate response to the T. W. O. C., and of diverting them to an organization of respondent's choice.[19] It selected those who were to form the organization upon which it had determined, added to this "committee" at will, apparently supplied it with cards and antiunion circulars printed in

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not regarded as important, and, in any event, no connection between Rhodes' conduct and the T. W. O. C. was established.

The further evidence upon which respondent has claimed that Nelson and Schofield, after their discharges, endeavored to bring about a sit-down strike is discussed, *infra*, pp. 71–72.

[17] On April 23, 1937, The Federation affiliated with the Associated Workers of Printing, Finishing & Allied Industries, a national organization opposed to both the A. F. of L. and the C. I. O. (R. 285), in order "to prove to the ones that were skeptical that we were not a company union" (R. 253–254, 233–234, 230). The Federation's membership is restricted to employees of respondent, and "outsiders" may not act as employee representatives (Bd. Exh. 24, R. 519–520).

[18] The Senate Committee on Eduation and Labor, discussing Section 8 (2), stated (Sen. Comm. Print Comparison of S. 2961, 73d Cong., and S. 1958, 74th Cong., p. 27):

"As the testimony before the Committee last year and this year amply demonstrates, it is at the stage of 'formation' that employer activity is most effective and harmful."

[19] Potter, an officer of the Federation (R. 215), testified that the Federation's purpose was to prevent organization of the employees by the C. I. O. (R. 228–229).

advance, dedicated company time and premises to the Federation campaign, and allowed supervisory employees to participate in it. Equally forceful, indeed more so, were respondent's repeated declarations that it would not bargain through the T. W. O. C., the freely chosen representative of the employees, and its discharge of that organization's leaders (*infra*, pp. 60–70). The genesis of the Federation and the employees' adherence to it were plainly attributable to respondent's unfair labor practices, which constituted pressure of the strongest kind and effected a complete denial to the employees of the rights guaranteed by the Act.

In view of the ample support for the Board's findings, the court below should have enforced the provisions of the order requiring respondent to cease and desist from its domination and interference, to withdraw recognition from and completely disestablish the Federation as a bargaining representative, and to post appropriate notices (R. 663–664). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *National Labor Relations Board* v. *Newport News Shipbuilding & Drydock Co.*, No. 20, this Term, decided December 4, 1939; *National Labor Relations Board* v. *Falk Corporation*, No. 460, this Term, decided

January 2, 1940; *National Labor Relations Board* v. *Waterman Steamship Corp.*, No. 193, this Term, decided February 12, 1940.

The court below apparently was of the opinion that, regardless of whether or not the Board's findings of company domination of and interference with the Federation are supported by substantial evidence, an election with the Federation on the ballot was a necessary prerequisite to enforcement of the disestablishment order (R. 688, 690, 691). The same position was taken by the Circuit Court of Appeals for the Seventh Circuit in the *Falk* case, and this Court held that the consequent failure to enforce the disestablishment order was erroneous. The position of the court below is likewise contrary to the decisions of this Court in the *Greyhound* cases.

III

THERE IS AMPLE EVIDENCE SUPPORTING THE BOARD'S FINDING THAT RESPONDENT REFUSED TO BARGAIN COLLECTIVELY WITH THE AUTHORIZED REPRESENTATIVE OF ITS EMPLOYEES IN VIOLATION OF SECTION 8 (5) OF THE ACT. THE BARGAINING PROVISIONS OF THE BOARD'S ORDER SHOULD THEREFORE HAVE BEEN ENFORCED

The Board found that on April 4, 1937, and at all times thereafter, the T. W. O. C. had been designated as their bargaining representative by a majority of respondent's employees in a unit ap-

propriate for purposes of collective bargaining, and that respondent refused to bargain with the T. W. O. C., as required by Section 8 (5) of the Act (R. 660, 662–663). Accordingly, the Board ordered respondent to cease and desist from such refusal and to bargain collectively with the T. W. O. C., upon request, as the exclusive representative of such employees (R. 663, 664). The court below vacated the order to bargain for the reason (at least in part) that, in its opinion, the finding of the Board that the T. W. O. C. had been designated by a majority of the employees was without support in the evidence (R. 688). The lower court erred, we submit, in so holding.

A. THE T. W. O. C. WAS DESIGNATED BY A MAJORITY OF THE EMPLOYEES

Respondent's pay roll shows that during the week ending April 10, 1937, there were approximately 750 employees in the appropriate unit (Bd. Exhs. 13A to 13V, R. 493–514; R. 51).[20] Schofield, who kept account of the union application cards returned to Nelson and himself by employees to

[20] The complaint alleged and respondent's answer admitted that the production and maintenance employees at respondent's Bradford, Rhode Island, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act (R. 11, 19). The Board found that the unit thus agreed upon was an appropriate one (R. 658, 662).

whom these two men distributed the cards for signature (R. 81, 103) testified that by April 4, 1937, 465 or 467 signed cards had been obtained (R. 81). There is also in evidence a list, compiled prior to April 10, 1937 (R. 338, 426, 534), of 481 names, which counsel for the Board, respondent, and the Federation agreed, after checking the list against the application cards themselves, was a correct list of the names appearing on the cards and did not include employees in classifications not within the appropriate unit (Bd. Exh. 30, R. 534–552; R. 340, 343–345).

The cards signed were of two types. One (Bd. Exh. 15) pledges the signer to become a member of an "affiliated union of the C. I. O." and authorizes "the affiliated union" to act as bargaining representative.[21] The other type (Bd. Exh. 16), which were sent to Schofield after the supply of application cards had been exhausted (R. 102–103), states that the signer accepts membership in the T. W. O. C. and authorizes it to act as collective bargaining

[21] The full text of this type reads (Bd. Exh. 15):

"I hereby pledge to become a member of an affiliated union of the C. I. O. for the purpose of bettering conditions for all workers. It is understood that by signing this card I will not be obliged to pay any initiation fee or monthly dues until such time as the workers in my plant or department are organized to the extent of at least 60%. I further agree to have the affiliated union act as my collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment."

representative.[22] The record does not show how many employees signed each type of card (R. 103), but it shows that the total employees who signed one type or the other constituted a majority.

Respondent does not question the sufficiency of the membership cards (note 22, *supra*), but contends that the application cards (note 21, *supra*) did not serve to designate the T. W. O. C. The only basis in the record for this contention is the admitted fact, apparently relied upon by the court below (R. 688), that the T. W. O. C. had not established a local union at Bradford at the time the cards were signed (R. 116).

It is a sufficient answer to this contention that the application cards do not refer to a local union but to an "affiliated union of the C. I. O." The union in the textile industry so affiliated is the T. W. O. C., with all the usual attributes, including the capacity to enter into contracts on behalf of those it represents (R. 87–88, 286, 288–289, 322–324, 326–328, 457; Bd. Exhs. 26, 32, 33, 34). The T. W. O. C. existed as a labor organization, as the Board found (R. 648, 662). It is this national union which was joined by those employees who signed

[22] The full text of this card reads (Bd. Exh. 16):

"I hereby accept membership in the Textile Workers' Organizing Committee of the Committee for Industrial Organization and of my own free will hereby authorize the Textile Workers' Organizing Committee, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment."

the membership cards (note 22, *supra*).[23] Nothing more was required to designate the T. W. O. C. to act as the employees' bargaining representative.

Since the employees designated the national organization, the absence of a local is immaterial. Moreover, the record shows that it is the established policy of the T. W. O. C. not to form a local union or collect fees or dues until the designation of the national union by signed cards has sufficiently proceeded to enable that union to achieve recognition as the majority representative (R. 116–117, 118, 287, 310, 320, 346, *supra*, note 21). There is evidence that these features of the T. W. O. C. practice were explained to those who signed

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[23] Salerno, director of the T. W. O. C. for the State of Rhode Island (R. 286), testified at length concerning the origin and functioning of the T. W. O. C. He testified that the T. W. O. C. was a labor organization representing workers for purposes of collective bargaining (R. 286), that employees of respondent who signed cards were members in good standing of the T. W. O. C. (R. 287), that the T. W. O. C. had negotiated 29 contracts with employers in Rhode Island alone (R. 288) and 392 contracts throughout the country (R. 288), that the T. W. O. C. was formed pursuant to an agreement between the C. I. O. and the United Textile Workers Union, whereby the functions of that union were absorbed by the T. W. O. C. for purposes of organizing the textile industry (R. 288–289, 323–324, 326–327, 330, 342–343; Bd. Exh. 34), and that the T. W. O. C. had issued a charter for a joint board for the State of Rhode Island (R. 289–290, 327–328; Bd. Exh. 26). The T. W. O. C. has rules and regulations governing the organization and conduct of its local unions and joint boards (R. 342; Bd. Exh. 33). Respondent produced no evidence whatsoever tending to show that the T. W. O. C. was not a presently functioning labor organization.

application cards (R. 331–333), and that a local would have been chartered in this case had respondent recognized the T. W. O. C. (R. 319–320, 329–331). Finally, there is uncontradicted evidence that respondent's employees were eligible for membership directly in the national T. W. O. C. (R. 286, 287, 346). There is no countervailing evidence whatever, and there can be no doubt that designation of the T. W. O. C. was intended by the employees. Employees are, of course, as free to select a national organization to represent them as they are to designate a local union or other agency. *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 680–681 (C. C. A. 6th), certiorari denied, No. 105, this Term. The Board was correct, therefore, in finding that the T. W. O. C. was the designated representative (R. 660, 662).

B. RESPONDENT REFUSED TO BARGAIN WITH THE T. W. O. C. WITHIN THE MEANING OF SECTION 8 (5)

1. It is not disputed that two conferences were held between Summersby, respondent's president, and representatives of the T. W. O. C. Salerno, director of the T. W. O. C. for the State of Rhode Island, testified in detail concerning what transpired at the first conference, which was held at the Hotel Biltmore in Providence on either April 8 or April 13.[21] According to Salerno, whose testimony

[21] The Board found that this first conference took place "on April 8 or 13" (R. 659). It did not resolve the conflicting testimony as to the date of this first meeting (R. 292–

the Board credited (R. 659), he informed Summersby that the T. W. O. C. represented a majority of the employees and requested recognition as the authorized bargaining representative (R. 292, 293, 303, 307); Summersby replied that respondent would recognize the T. W. O. C. if it had a majority and that he would instruct Cross, respondent's attorney, to draw up a tentative agreement to that effect (R. 293–294, 307–308). Salerno further testified that he called upon Cross on Tuesday, April 13, and that Cross advised him not to seek a further conference with Summersby since "It will only be a waste of time. * * * You might as well not go." (R. 294). Cross did not testify at the hearing and Salerno's evidence concerning this conversation stands uncontradicted.[25]

294, 304–305, 307–308, 429, 453–455, 515–517) because, under the Board's view of the case, it is immaterial whether this conference occurred before or after respondent's recognition of the Federation on April 9 (*infra*, pp. 39–47).

[25] Summersby's testimony concerning his negotiations with the T. W. O. C. prior to the second conference on April 16 may be briefly summarized as follows: He had no request for a meeting with the T. W. O. C. prior to April 13, when Bernard, the federal conciliator, asked him to meet with the union representatives (R. 452–453); he told Bernard that respondent had already recognized the Federation (R. 453); on the evening of April 13, he and Bernard, and Slade, another of respondent's attorneys, went to Salerno's room in the Hotel Biltmore (R. 454); he did not understand that he was going to the hotel "for the purpose of a collective bargaining conference" (R. 455); Salerno requested union recognition and an agreement and asserted that the T. W. O. C. represented a majority of the employees (R.

Nevertheless, Salerno sought a further meeting with Summersby on April 16 (R. 295). The testimony of the two principal participants is substantially in accord as to what occurred. Summersby had agreed to meet with Bernard, a conciliator of the Conciliation Service of the United States Department of Labor, and with Schofield and Nelson in an effort to settle the controversies arising from the discharge of these two employees (R. 456). Salerno likewise appeared, offered to prove that the T. W. O. C. represented a majority, and requested recognition of the T. W. O. C. and a contract; Summersby replied that respondent had already recognized the Federation and would not recognize or deal with the T. W. O. C. (R. 297–299, 306–308, 456–458). According to Salerno, Summersby said that "he was afraid of an outside union" and that "I have signed with another union and I am satisfied" (R. 299, 308).

2. As an additional ground for its refusal to recognize the T. W. O. C., respondent asserts that Sa-

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454–455); he refused these requests on the ground that respondent had already recognized the Federation (*ibid.*); after he and Bernard left Salerno's room, Bernard suggested that an election be held with both the T. W. O. C. and the Federation on the ballot, but he rejected this proposal on the ground that respondent had already recognized the Federation (R. 456). Slade, respondent's attorney, testified that he attended the conference at the Biltmore and that it was held on April 13, but did not testify concerning what transpired at the conference (R. 428–429).

lerno refused to submit the T. W. O. C. cards for Summersby's examination, a claim sustained by the court below (R. 688). But while Summersby testified that he requested evidence of majority at each conference (R. 455, 473), his specific testimony concerning his refusal to bargain shows that the refusal was in fact based solely upon respondent's prior recognition of the Federation (R. 457–458). Having rested the refusal upon that broad ground, respondent may not now defend upon the narrower basis of a claimed ignorance of the T. W. O. C. majority. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868–869 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Art Metal Construction Co.* v. *National Labor Relations Board*, decided February 26, 1940 (C. C. A. 2d); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9th). In the *Remington Rand* case the court, per L. Hand, J., stated (94 F. (2d) 868–869):

> In the case at bar even though the respondent were in doubt as to the Joint Board's authority, that doubt did not excuse it; for it is quite plain that its position was not based upon any doubt, but upon its unwillingness to treat with "outside" representatives of its employees; * * * it may not now say that it could not know whether the Joint Board was properly accredited. Had that been the real reason for its refusal, presumably it would have been persuaded

by the evidence which the Joint Board could have presented. It made no effort to learn the facts and took the chance of what they might be.

Salerno testified without contradiction that Summersby did not specifically request the cards, but merely asked for proof, and rejected offers by Salerno to submit the cards "to any impartial person" for checking (R. 297–298, 303, 304, 306). Thus, in fact, the T. W. O. C. made an entirely reasonable effort to prove its majority claim.[25] If respondent had in truth entertained *bona fide* doubts concerning the T. W. O. C. claim, the way was open for their resolution.

C. THE DESIGNATION OF THE COMPANY-DOMINATED FEDERATION BY A MAJORITY OF THE EMPLOYEES BEFORE RESPONDENT'S REFUSAL TO BARGAIN OCCURRED IS NOT MATERIAL TO THE QUESTION WHETHER SUCH REFUSAL VIOLATED THE ACT

The ground upon which respondent actually refused to bargain with the T. W. O. C. was that, at the time of the refusal, the Federation represented a majority of the employees and had been recognized by respondent as the exclusive bargaining agency. But the Federation was formed as a re-

[25] Where circumstances suggest a danger, the Board does not compel the revelation to the employer of the names of union members in receiving proof of representation, but endeavors to establish the fact in some other satisfactory manner. (See R. 89–90, 111.) The discharges of the active T. W. O. C. leaders in this case (*infra*, pp. 60–70), illustrates one basis for this position.

sult of respondent's illegal efforts to defeat the T. W. O. C. and to establish another bargaining representative for its employees (*supra*, pp. 20–30). Consequently, respondent is really contending that it may, by violations of law, wipe out the majority obtained by the representative freely chosen by its employees and then advance the disruptive effects of its unlawful conduct as a valid ground for a refusal to deal with that representative; in short, that it may enjoy, as a fruit of its violations of Section 8 (1) and (2), an immunity from the operation of Section 8 (5). We submit that this position cannot be sustained. The Board's authority extends "not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, * * * as the means of defeating the statutory policy and purpose." *National Licorice Co.* v. *National Labor Relations Board*, No. 272, this Term, decided March 4, 1940.

The Act sanctions only the free choice of representatives. It does not permit but prohibits an employer-coerced selection and recognition of an agency so chosen. It is manifest that these mandates of the Act were transcended in this case. The Federation was inspired and dominated by respondent, and "by intimidation and coercion [respondent] compelled its employees to join" it, as the Board found (R. 657–658). Hence those employees who joined the Federation did not do so

voluntarily, and their action must be discredited as an indication of a free choice.[26a] In a real sense, the T. W. O. C. remained the employees' freely chosen representative after their forced adherence to the Federation; respondent's illegal pressure may have elicited surface manifestation of a shift of allegiance, but it cannot be supposed to have accomplished more than that. Since no factor other than respondent's interference intervened, it must be assumed that but for that interference a majority of the employees would have adhered openly to their first and only free choice.[27] To hold otherwise would be to allow one violation of the Act to be accomplished successfully through others and to open a broad avenue of escape from the bargaining mandate of Section 8 (5). It is upon these bases that the Board held that (R. 660):

> The unfair labor practices of the respondent cannot operate to change the bargaining representative previously selected by the untrammelled will of the majority.

[26a] It may be noted in passing that the evidence indicates that those employees who first designated the T. W. O. C. and later signed Federation cards did not thereby necessarily withdraw or repudiate their membership in the T. W. O. C. and their designation of it as their bargaining representative (see R. 104, 249, 263).

[27] In the absence of proof to the contrary, it would be presumed that the large majority of employees who had freely elected to be represented by the T. W. O. C. on April 4 (*supra*, pp. 31–32), would continue to desire representation by that union on April 16.

The Board has taken the same position in a subsequent case in which its view was upheld upon review by the Circuit Court of Appeals for the Sixth Circuit. *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, enforcing *Matter of Arthur L. Colten et al.*, 6 N. L. R. B. 355. In that case the employer defended his refusal to bargain upon the ground that a petition signed by a majority of the employees and an "election" conducted by the employer in the plant demonstrated that the union had lost its previously established majority. The Board found, however, that the employer had utilized coercion to obtain signatures to the petition and that the "election", which climaxed the employer's campaign against the Union, was held under similar intimidating circumstances (6 N. L. R. B. at 359–362, 367),[28] Adhering to the principles of its decision in the instant case, the Board refused to give effect to the defections induced by the employer's illegal conduct. The Court upheld the Board, although referring specifically only to the "election" (105 F. (2d) 182):

> The Board declined to recognize this election as representing a free expression of choice on the part of the employees so as to absolve the respondents from the charge of unfair

[28] The *Colten* case is further similar to this one in that the employer's unfair labor practices against the legitimate union included the formation of a counteracting "inside" union dominated and interfered with by the employer (6 N. L. R. B. 362–364).

> practice in refusing to bargain collectively with an organization previously selected as the bargaining agent. * * * The findings of the Board are supported by evidence, and insofar as they fail to recognize the April 2d poll as decisive of majority withdrawal from the union, will be accepted, National Labor Relations Board v. Remington Rand, Inc., 2 Cir., 94 Fed 2d, 862.

The principle that a labor organization freely chosen by a majority of the employees as their bargaining representative is presumed to retain that status until the employees reject it of their own volition, *discounting the effects of employer coercion,* was established prior to the Act by the decision in the *Railway Clerks* case. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, affirming 33 F. (2d) 13 (C. C. A. 5th), affirming 24 F. (2d) 426, 25 F. (2d) 873, 876. In that case, the Brotherhood sought to enjoin violations of Section 2 (3) of the Railway Labor Act of 1926,[29] claiming that, although it had been freely selected as their bargaining representative by a majority of the clerical employees of the carrier, the

[29] C. 347, 44 Stat. 577; U. S. C. Title 45, secs. 151–163. Section 2 (3) provides as follows:

"Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization, or unincorporated association, or by other means of collective action without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

latter was fostering the Association of Clerical Employees and was coercing the employees to repudiate the Brotherhood and designate the Association. The District Court issued a temporary injunction, and, in contempt proceedings, it was proved that the Company had, despite the injunction, recognized the Association as the employees' representative and, consequently, had ceased to recognize the Brotherhood. The company's defense was that, prior to the filing of the injunction suit, the Association had obtained authorizations from a majority of the employees and thereby had gained, and the Brotherhood had lost, the status of bargaining representative. The District Court rejected this defense, holding the number of authorizations obtained by the Association to be irrelevant since they had been obtained by "the use of means in violation of the statute" (24 F. (2d) 432, 434). Accordingly, it held the company and certain of its officers in contempt. The further relief ordered by the District Court is described as follows in the opinion of this Court (281 U. S. 557):

> The Court directed that, in order to purge themselves of this contempt, the Railroad Company and these officers should completely "disestablish the Association of Clerical Employees," as it was then constituted as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, until such time as these employees by a secret ballot taken in accord-

ance with the further direction of the Court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives.[30]

On appeal, the Circuit Court of Appeals for the Fifth Circuit held that the provisions of the contempt order were an appropriate exercise of the District Court's authority under the statute "to provide for the restoration of the status quo" (33 F. (2d) 13, 17). This Court affirmed, holding that "We do not find that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act" (281 U. S. 571).

As this Court has recognized (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines,*

[30] The District Court denied a motion by the company to vacate the decree, the court stating that the decree was designed "to restore the status quo ante" (25 F. (2d) 877). The court referred to the desirability of "restoring the brotherhood to their undoubted status quo ante as representative of the employees * * *" (*ibid.*), noted that "the status restored was disturbed by the railroad company, in violation of the law and of the injunction" (25 F. (2d) 878), and reaffirmed its view that the injunction and contempt order did no more than to sustain the right of the employees to select their representative free of any employer interference or coercion (*ibid.*). The modified decree read in part: "reinstating and reestablishing the said brotherhood as the representative of the clerical employees * * * substantially as said status was on June 1, 1927, until such time as said clerical employees by a secret ballot * * * or by any other means of selection which the employees themselves may decide upon and adopt, and without the dictation or interference of [the company or its named officers], shall choose another representative or representatives" (*ibid.*).

Inc., 303 U. S. 261, 266–267), and as the legislative history clearly shows,[31] Congress, in enacting the present statute, relied upon the *Railway Clerks* decision and upon the principles stemming from that decision, which have been adopted by administrative tribunals created to deal with labor problems. The view that, despite apparent or "surface" repudiation of a majority representative induced by illegal employer action, the representative is presumed to retain such status until the employees freely select another representative or choose not to be represented, and that adherence to a company-dominated union is not an expression of free choice inconsistent with the prior designation, was adopted by the first National Labor Relations Board,[32] with express reference to the remedial action sanctioned in the *Railway Clerks* case. *Matter of North Carolina Granite Corporation*, 1 (old) N. L. R. B. 89; *cf. Matter of Danbury & Bethel Fur Company*, 1 (old) N. L. R. B. 195. See also *Matter of Lyon Oil Refining Company*, Decisions of the Petroleum Labor Policy Board, p. 34.

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[31] Report of House Committee on Labor (H. Rept. No. 1147, 74th Cong., 1st Sess.), pp. 3–7, 15–18, 22, 24); Report of Senate Committee on Education and Labor (S. Rept. No. 573, 74th Cong., 1st Sess.), pp. 2, 9, 13, 16, 17.

[32] Created under Public Resolution No. 44, 73d Congress, 2d Session, to protect the freedom in selection of bargaining representatives guaranteed in Section 7 (a) of the National Industrial Recovery Act.

The decisions of the present Board in this case, the *Colten* case, and others,[38] have therefore, a solid foundation in the landmark *Railway Clerks* decision and in past practice of analogous predecessor administrative agencies. Upon these precedents, the Board correctly found that respondent violated Section 8 (5) and (1) of the Act by refusing to bargain with the T. W. O. C. as the exclusive representative of the employees.

D. THE ORDER REQUIRING RESPONDENT TO BARGAIN WITH THE T. W. O. C. IS VALID AND SHOULD BE ENFORCED

The court below declined to enforce the bargaining order. One announced basis for its position was its holding that the evidence did not support the finding that the T. W. O. C. represented a majority of the employees prior to respondent's refusal to bargain (*supra*, pp. 30–31). The court further held that an election should be conducted with both the Federation and the T. W. O. C. on the ballot, to determine the present bargaining agency (R. 690–691). The latter conclusion appears to have been predicated in part upon the holding concerning the question of the T. W. O. C. majority, and in part upon the view that an election is a prerequisite to the disestablishment of a dominated

[38] *Matter of American Radiator Co.*, 7 N. L. R. B. 1127, 1150; *Matter of Union Envelope Co.*, 10 N. L. R. B. 1147, 1152-1153; *Matter of Reed & Prince Manufacturing Co.*, 12 N. L. R. B. 944, 948–949; cf. *Matter of Clark Shoe Co.*, 17 N. L. R. B. No. 108, at pp. 6, 10.

representative. As we have shown, neither basis is valid (*supra*, pp. 30, 31–35), and neither can support an attack upon the validity of the bargaining order when issued by the Board, or furnish an objection to its enforcement by judicial decree in line with the applicable precedents enforcing bargaining orders of the Board.[34]

The only other question which might be raised is whether the Board is entitled to enforcement of the bargaining order regardless of possible changes in representation occurring since the refusal to

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[34] *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *McNeely & Price Co.* v. *National Labor Relations Board*, 106 F. (2d) 878 (C. C. A. 3d); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713 (C. C. A. 3d); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146 (C. C. A. 5th); *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5th); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, No. 105, this term; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6th); *National Labor Relations Board* v. *The Boss Mfg. Co.*, 107 F. (2d) 574 (C. C. A. 7th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9th).

bargain.[35] In this connection, two decisions of the Circuit Court of Appeals for the Second Circuit have conditioned enforcement of bargaining orders upon a determination, in an election to be held after entry of the decree, that the representative named in the order has retained its majority status, and one decision of the Eighth Circuit has refused enforcement of the bargaining order without proof of majority representation as of the time of the court's review of the order. *National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2d), modified and affirmed, No. 272, this Term, decided March 4, 1940; *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2d), petition for certiorari pending, No. 664, this Term; *Hamilton Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th). Four other decisions of the Circuit Courts of Appeals have rejected similar proposed modifications of bargaining orders. *International Association of Machinists* v. *National Labor Relations Board*, decided November 20, 1939 (Ct. App.,

[35] Such changes might occur after the refusal but prior to the hearing before the Trial Examiner, or after the close of such hearing but prior to issuance of the Board's order, or after the order has issued but prior to entry of the court's decree. For purposes of the present discussion we do not distinguish among changes occurring during different periods of time after the refusal to bargain; our argument goes to the relevancy of any change asserted to occur after the refusal to bargain in violation of the Act. See *infra*, pp. 55–56.

D. C.), petition for certiorari pending, No. 732, this Term; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, No. 105, this Term; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 98 F. (2d) 18 (C. C. A. 9th). We submit that the first line of cases are erroneous, and that those in the second group are correct.

Enforcement of a bargaining order, based upon a refusal to bargain with an agency representing a majority at the time of the refusal to bargain, is justified, regardless of possible changes in representation thereafter, for two compelling and related reasons. Requiring an employer to recognize and negotiate with the representative with whom he refused to deal in violation of the Act is necessary, first, in order to dissipate the coercive effects of the unfair labor practices by restoring the right denied the employees and thus to effectuate the Act's fundamental purpose of insuring collective bargaining under free conditions;[36] and, second, in order that the collective-bargaining provisions

[36] A similarity will be perceived between the present question, going to the validity of the bargaining order, and that discussed under the heading C, pp. 39–47, *supra*, namely, whether Section 8 (5) is violated by a refusal to bargain after asserted destruction of the union's majority as a result of unfair labor practices. The employer's position on both

of the Act shall not be rendered unworkable and unenforceable. We shall consider these reasons in turn.

1. Employees join labor organizations, and otherwise designate representatives, to secure collective bargaining. Accordingly, whether or not the employer recognizes and bargains with the agency selected by the employees is a decisive factor affecting the ability of that representative to secure or retain its constituents. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 568–569. Indeed, the natural and intended effect of a refusal to recognize and bargain with the employees' representative—to preclude the exercise of its principal and essential function—is to divert the employees to a second choice or to persuade them to abandon completely their collective bargaining objective by emphasizing the futility of any representation. An unlawful refusal to bargain with a freely chosen representative, like the illegal recognition of an employer-dominated organization for bargaining purposes, constitutes a "con-

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questions is essentially the same: having driven his employees away from their chosen representative by rebuffing their efforts to bargain and by otherwise influencing their choice, he points to the disruptive effects of his unfair labor practices as a reason for relieving him of the duty to bargain imposed by the Act.

tinuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing." *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275. For this reason, so long as a refusal to bargain lacks effective remedy and the obstacle to free choice which it has created continues, any asserted shift away from the freely chosen representative cannot be regarded as the uninfluenced and voluntary action of the employees. The shift might not, and normally would not, have occurred if the representative first chosen had been ~~reorganized~~ recognized, as required by the Act. Since the Act proceeds upon the premise that conduct which it prohibits does interfere with freedom of choice, certainly any asserted change, or doubt upon the matter, must be held to be immaterial and be disregarded in order to give full effect to the policy of the Act to promote and insure only free selections. *Cf. National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term.

This objective cannot be attained merely by restraining unfair labor practices through the cease and desist provisions. The refusal to bargain must be undone by restoring the representative freely chosen by the employees to the position which they conferred upon it but which the employer wrongfully withheld. The order, if it is to effectuate the policies of the Act, must do so by "eradicating" all the effects of the unfair labor

practices, "as from the beginning." *Agwilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146, 151 (C. C. A. 5th). This can be accomplished only by including in the order a remedy adequate to relieve the coercive effects of the refusal to bargain; that remedy is enforcement of the obligation to negotiate.

The *National Licorice, American Manufacturing*, and *Hamilton-Brown* cases give no weight to this important consideration. In conditioning enforcement of the bargaining order upon proof of representation at the time of review, those decisions assume that an unremedied refusal on the part of an employer to recognize the representative the employees freely selected is irrelevant to that agency's continued free designation, and will not influence their decision whether or not to designate that representative again. We submit that a failure to enforce the bargaining order leaves the employees subject to impediments to a free choice equal in force and at least equivalent in character to those left in operation by the temporary disestablishment ordered in the *Falk* case by the Circuit Court of Appeals. If a choice of representatives, freely made, is permitted to go unprotected by the agencies of government charged with safeguarding that choice, the employees who made it cannot be expected to venture that selection again.

In short, if the Board's "judgment and discretion in determining, upon the basis of the findings,

whether the case is one requiring an affirmative order, and in choosing the particular relief to be ordered". (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265) is to be overruled upon the single basis that the chosen representative's majority status may have been lost after the refusal to bargain, full scope will be given to the unfair labor practice in achieving its intended result and the development of genuine collective bargaining will be substantially hindered. We submit that the Act does not allow an interpretation yielding results so inconsistent with its purposes.

2. The decisions modifying the Board's bargaining orders (*supra*, p. 49) prevent effective and orderly administration of Section 8 (5). Congress intended that this provision should be enforced, and in a workable way. Yet, if asserted changes in representation, alleged to have occurred subsequent to a refusal to bargain with a majority representative, are a barrier to remedying the unfair labor practice by an order compelling obedience to the statutory obligation, Section 8 (5) is rendered sterile. If one such claim must be inquired into, successive ones must be, with the result that the Board, as well as the reviewing courts, could never reach a decision.[37] That is the necessary result of the position of the court in the *Hamilton-Brown* decision.

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[37] In *National Labor Relations Board* v. *The Boss Manufacturing Co.*, 107 F. (2d) 574 (C. C. A. 7th) the Board

The modification ordered in the *National Licorice* and *American Manufacturing* decisions is more clearly erroneous; in those cases, without any evidence tending to establish a change, but solely upon doubts raised *sua sponte* because of lapse of time, the reviewing court declined to enforce the bargaining order as issued. Lapse of time is inevitable, at no fault of the employees, their representative or the Board. It is a concomitant of all administrative or judicial proceedings. Certainly the procedure Congress prescribed for enforcement of the Act cannot be utilized as a basis for not enforcing it. If changes in representation thought to have occurred after a refusal to bargain are relevant at all, which we submit they are not (*supra*, pp. 51–54), clearly only changes occurring prior to the Board's order and reflected in the record made

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rendered an order in August 1937, based upon a prior refusal to bargain. The order required the company to bargain with the union illegally denied recognition. In October 1937 the Board filed a petition for enforcement. In January 1938 the court granted a motion by the company to adduce additional evidence, in which motion it was asserted, *inter alia*, that the proof of majority was too old to support the bargaining order. Upon further hearing before the Board it appeared that membership in the union had increased since the refusal to bargain. The Board filed its supplemental findings with the court and again requested enforcement of its order. When the case came on to be heard in June 1939 the company again insisted that proof of the union's present majority status was an essential prerequisite to enforcement of the bargaining order. The court enforced the provision in question without expressly ruling upon this objection.

at the hearing before the Board should be considered. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term. *Cf. National Labor Relations Board* v. *Fansteel Metallurgical Co.*, 306 U. S. 240, 261–262.

The sole reason advanced for refusing to enforce the bargaining order is that it may fasten upon the employees a representative which the majority may no longer desire, independently of the effects of the unfair labor practices. But "until the Board's order has been faithfully carried out" the employees' real desires "are matters of speculation and argument." *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867 (C. C. A. 5th). Section 9 of the Act provides adequate machinery for resolving questions of representation after genuine freedom of selection has been restored by removing the impediments the employer has erected. The Board's order cannot be said to foist a representative upon the employees when they, or any labor organization on their behalf, may at any time raise anew the issue of representation. The only question is whether that issue shall be determined in circumstances which will insure complete freedom of choice. We submit that to anticipate the question of change without, and in advance of, according recognition to a

selection voluntarily made, is to proceed under conditions which leave the employees subject to improper restraints. Obtaining collective bargaining order should not require the employees to pay such a price. On the contrary, enforcement of the bargaining order creates the very conditions of freedom of choice which are envisaged by the Act.

The remedy deemed appropriate in the *Railway Clerks* case was reinstatement of the last freely chosen representative to the position of bargaining agency "until such time as these employees by a secret ballot taken in accordance with the further direction of the Court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives" (*supra*, pp. 44–45). This remedy, devised by a court of equity to restore the status disrupted by interference with freedom of choice, is even more appropriate under the National Labor Relations Act since Section 9 is expressly designed to determine a change in representation and readily permits effective expression of a change.

The foregoing considerations have been given due weight in the decisions rejecting proposed modifications and enforcing the bargaining order as issued by the Board (*supra*, pp. 49–50). In *International Association of Machinists* v. *National Labor Relations Board*, decided November 20, 1939 (App. D. C.), petition for certiorari pending, No. 732, this Term, a rival organization petitioned the court to set aside an order of the

Board requiring *inter alia* that the employer bargain with a labor organization which had been designated by a majority of the employees at the time the violation of Section 8 (5) was committed. The petitioner asserted that subsequent to the hearing before the Board's trial examiner a majority of the employees had designated it as their bargaining representative. The Board had found that many of the employer's unfair labor practices were designed to coerce the employees to withdraw from the union they had selected and to join the petitioner. The court, in addition to ruling that petitioner should have moved to adduce additional evidence if it wished the court to take cognizance of the asserted shift, pointed out that since the unfair labor practices had not been remedied at the time of the Board's order, "any shift * * * presumably must have been affected or effected by them." It therefore held that a "presumption arises that the freely established majority continues until the Board has an opportunity to make its decision. * * * Any other rule would make a merry-go-round of the Act, since like representations could be made in turn following each new one by the contending unions in order to prevent or delay a decision contrary to their interests, with no other result than to maintain the proceeding in a state of indefinite suspension and indecision."

Similarly, in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585, an intervening labor organization asserted that it had become the majority representative after the refusual to bargain and that the bargaining order should not be enforced but that the case should be remanded to the Board for redetermination of the question of representation. The court enforced the order without modification, stating that the representative illegally denied recognition should be given "some presumptive authority, for otherwise the Act will not be workable" (94 F. (2d) 870).[38] In *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th) the court denied

[38] In its opinion the court stated that it would not treat a subsequent refusal to bargain as a contempt of its decree if it was based upon a challenge of the union's continued authority advanced "in good faith" (94 F. (2d), 870). This qualification should be interpreted as meaning that, after the coercive effects of the refusal to bargain have been removed by means of the employer's bargaining with the union for a reasonable period, the employer may rely upon a *bona fide* assertion that the union does not represent a majority. The lack of a majority at that time would be attributable to reasons other than the unfair labor practices. So interpreted, the qualification does no more than to state the conceded limitations of the Board's position. The subsequent decisions of the Second Circuit in the *National Licorice* and *American Manufacturing* decisions represent, we submit, an erroneous departure from the rule of the *Remington Rand* case, where the Board's bargaining order was enforced without conditioning it upon the results of an election and without other modification.

a motion to adduce evidence that the union involved had ceased to be the authorized bargaining representative.[39] Thereafter the court enforced the Board's order without modification, 98 F. (2d) 18. See also *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6th), certiorari denied, No. 105, this Term.

We submit that these decisions are correct and that the contrary decisions we have referred to (*supra*, p. 49) substantially impede, without justification, enforcement of the duty to bargain which the Act imposes. The order requiring respondent to bargain collectively with the T. W. O. C. is valid and should be enforced without modification.

IV

THE EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENT DISCHARGED TWO EMPLOYEES IN VIOLATION OF SECTION 8 (1) AND (3) OF THE ACT. THE BOARD PROPERLY REQUIRED RESPONDENT TO REINSTATE THESE EMPLOYEES WITH BACK PAY

The Board found that respondent, in violation of Section 8 (1) and (3) of the Act, discharged Nelson

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[39] The court said, citing the *Remington Rand* case (96 F. (2d), 198):

"This is not the extraordinary case in which there is what practically amounts to judicial notice that the union had been dissolved and a new union now represents a majority of the men, and hence we are not required to consider our power in the light of such a situation. We are entitled to presume that the union recognized by the Board has continued to be such a bargaining agency during the period between the date of the Board's order and that of the motion, 'otherwise the Act would not be workable.'"

and Schofield, the T. W. O. C. leaders, because they had joined and assisted that organization (R. 649–654, 662), and accordingly ordered their reinstatement with back pay (R. 664). The court below held in effect that these findings were not supported by substantial evidence, and further, that, upon its view of certain evidence concerning their subsequent conduct, the reinstatement of the two employees was unauthorized (R. 688–690). Its holding on each issue, we submit, was erroneous.

A. THE BOARD'S FINDINGS ARE AMPLY SUPPORTED BY EVIDENCE

Nelson.—The significant steps leading to Nelson's discharge by Summersby were as follows: Nelson and Schofield began on March 27 to enlist the other employees in the T. W. O. C. and their efforts met with immediate success (*supra*, p. 21). On the morning of April 2, Silvia, the employment manager, accused Nelson of being the T. W. O. C. "ringleader" and sought to elicit from him the names of those who were helping to organize the T. W. O. C.; Nelson refused to divulge their identity (*ibid.*). About noon the same day Summersby sought to persuade both Nelson and Schofield to direct their efforts toward the formation of a "union of our own in the shop" (*ibid.*). Later that afternoon Summersby again importuned Nelson to take the lead in forming that type of labor organization (*supra*, p. 22). On the following morning, so Nelson testified, Summersby re-

newed this request; when Nelson refused to accede, Summersby angrily accused Nelson of trying to run the plant, brought up various alleged acts of misconduct, and finally ordered Nelson to "take two weeks off and cool off" and to "think it over" because Nelson was "too excited about this C. I. O." (R. 139–141, 169.) This testimony was substantially confirmed by Dudley, Nelson's foreman, who was a witness for respondent (R. 399–400). Summersby at the same time refused to state whether Nelson would be taken back after his forced "vacation" (R. 141, 167, 450). During the ensuing two-week period respondent announced that it would not reinstate Nelson, thus consummating the discharge.[40]

Respondent advances, as the main reason for Nelson's punishment, his asserted lateness in start-

[40] Respondent's contention (R. 18–19, 450–451), apparently credited by the lower court (R. 687, 689), that Nelson was not discharged but forfeited his job when he did not return after 2 weeks, is conclusively rebutted by undisputed evidence. During Nelson's "vacation," at two conferences with Salerno, the T. W. O. C. director, and Bernard, a federal conciliator, Summersby unequivocally refused to take either Nelson or Schofield back, and the two employees were so notified (R. 83–86, 97–98, 126, 142–143, 161–162, 168–170, 293, 300–302, 307). Summersby himself testified that at the April 16 conference (which was during the "vacation") he told Salerno and Bernard that respondent would not reinstate either Nelson or Schofield "because it would break down the discipline of our plant" (R. 488). Summersby could not satisfactorily explain why he took part in "hearings" before Bernard upon the merits of the two discharges if Nelson was merely on "vacation" (R. 487).

ing work on the day of his discharge. Dudley, Nelson's foreman, testified that on April 3 Nelson engaged in conversations with other employees and did not start work until 7:30 instead of 7:00 A. M. (R. 397–398); according to respondent's witnesses, Dudley is said to have reported the incident immediately to Summersby and to Pierce, respondent's chief engineer (R. 399–401, 408, 411, 412, 449). On cross-examination, however, Dudley admitted that Nelson may have started work on time and may have been helping another carpenter during the half hour in question (R. 403–404). Nelson testified without contradiction that he began work promptly at 7:00 A. M. (R. 138–140, 159–161); although he engaged in some discussion concerning T. W. O. C. affairs during the first half hour, Nelson definitely stated that the talking took no more than "a couple of minutes at the most" and that he promptly resumed work (R. 138–139, 159–160). The Board clearly was justified in accepting Nelson's version of the affair on the basis of this testimony.

There is other evidence, moreover, which corroborates Nelson's testimony and discredits the contention now advanced by respondent. Dudley, knowing of Nelson's union activities, assumed that the conversation in which he engaged on the morning of April 3 concerned the T. W. O. C. (R. 405–406, 408). There was no plant rule against talking (R. 415), and respondent had previously en-

couraged and permitted wholesale solicitation and a mass meeting on behalf of the Federation, all on company time (*supra*, pp. 24–26). Respondent took no disciplinary action against the men who talked with Nelson that morning (R. 411, 414), and punishment for talking was apparently unknown at respondent's plant (R. 413); Nelson had previously talked during working hours without reprimand (R. 405, 411–412).[41] Nelson, moreover, was admittedly "a very good workman" of two years' service with respondent at the time of his discharge (R. 407, 131).

Considering this evidence with that previously reviewed showing the real grounds of Summersby's action against Nelson (*supra*, pp. 61–62), it is a clear inference that Nelson's successful endeavors to organize the men for the T. W. O. C. was the true basis of his discharge and that his asserted talking and lateness in starting work was only a convenient excuse used by respondent as a means of ridding itself of an active union leader. Summersby's proposals to Nelson to turn his efforts toward formation of an "inside" union were repeated after the "offense" had already occurred upon which respondent now attempts to base the

[41] Foreman Dudley testified that he had not reported Nelson for talking on these previous occasions because "I didn't think he was talking about this union stuff. I thought he was talking about ordinary things" (R. 405). On April 3, however, Dudley "supposed" that Nelson was talking about the C. I. O. (R. 405–406, 408).

discharge. It was only when Nelson failed to accept these proposals that the "offense" became important. Indeed, Foreman Dudley testified that, in his opinion, the asserted lateness and talking did not have much to do with Nelson's lay-off (R. 407); in view of what Dudley overheard Summersby say to Nelson (R. 399–400), which is entirely inconsistent with Summersby's description of the conversation (R. 449–450), but follows closely that of Nelson (R. 139–141), the foreman could entertain no other honest opinion. The discharge was clearly caused by Nelson's refusal to forsake the T. W. O. C. and help Summersby organize an "inside" union, as the Board found (R. 650–652, 662).[42]

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[42] At the hearing respondent's witnesses advanced various additional criticisms of Nelson as factors assertedly influencing Summersby's decision. One was Nelson's alleged rudeness in entering the meeting in Summersby's office on April 2, at which Summersby was discussing working conditions with a group of employees (note 11, pp. 21–22, *supra*). As a result of this incident, Summersby testified, he investigated Nelson to ascertain "if he had been active in the C. I. O. as an organizer," and to have discovered that Nelson had been in the plant one night without permission (R. 447–449). But these tangential matters, shown by the testimony of Nelson, Summersby, and other witnesses to have been entirely trivial (R. 80, 134, 137, 155–157), resulted in no discipline by respondent when first brought to its attention. Indeed, Summersby did not contradict Nelson's testimony that the former declined to discipline Nelson for his nocturnal visit to the plant (R. 136–137, 470–471), the purpose of which was to pick up T. W. O. C. cards (R. 137). Nor did knowledge of these alleged factors deter Summersby from continuing his efforts to enlist

Schofield.—It was Schofield, co-leader with Nelson of the T. W. O. C. campaign, whom Summersby first approached with his proposal that an inside union be substituted for the T. W. O. C. (*supra*, p. 21). Unlike Nelson, Schofield immediately discouraged Summersby's importunities by stating that Summersby's idea was "no good; I never seen a shop union that was any good" (R. 79). Despite Nelson's discharge on April 3, Schofield continued his efforts to organize the employees (R. 81). On April 6, at the height of Summersby's campaign for an "inside" union, Schofield was discharged, purportedly for smoking in the men's locker room (R. 10, 18, 293, 465). It is conceded that Schofield committed the offense charged, but there is substantial support for the Board's view that Schofield's union activities, not his smoking, constituted the real cause of his elimination.

Schofield had worked for respondent for five years at the time of his discharge, and on April 2 Summersby had held him up as a model whom Nelson would do well to follow (R. 74, 449). The rule against smoking was violated daily, the employees apprehended receiving penalties no more severe than short layoffs (R. 82, 123–124, 127, 129, 145–147, 163–166, 378, 396). Hopwood, an em-

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Nelson's aid in forming an "inside" union (*supra*, pp. 61–62). They assumed importance in respondent's eyes only after Nelson had thereafter finally rejected Summersby's proposals at the time he was discharged on April 3 (R. 139–140, 399–400). As shown in the text, it was that decision by Nelson which immediately caused his discharge.

ployee for 12 years and head of the dyeing department for 7, could recall only one previous discharge for smoking during these periods (R. 378, 384, 386). Schofield himself had been caught smoking on two previous occasions without incurring the drastic penalty of discharge (R. 383).

The actions of Hopwood, who found Schofield smoking and reported the offense to Vice-president Pawson, indicate that respondent was seeking to apprehend Schofield in some action which would furnish a colorable pretext for discharging him. Hopwood testified that Schofield was the only man he had ever reported to the main office for smoking; his uniform practice was to impose short lay-offs himself (R. 370–372, 374–375, 378, 382–383). About 2:30 p. m. on April 6 Summersby had notified Hopwood to send Schofield to Summersby's office; thereupon both Shawn, Hopwood's second hand, and Hopwood himself separately delivered this message to Schofield (R. 81–82, 93, 365, 377–378). Hopwood gave Schofield permission to wash up and change his clothes before going to Summersby (R. 82, 93–94). In the locker room Schofield met two other employees and all three lit cigarettes (R. 82, 388). While Schofield was changing his clothes, Hopwood entered the locker room, a very unusual action on his part (R. 82, 394), saw Schofield smoking, and (according to a witness for respondent) exclaimed in effect that Hopwood

"had" Schofield at last (R. 390).[43] Hopwood accompanied Schofield part way to Summersby's office but then returned to the locker room in order to ask Nichols, one of the two other employees there, whether he had seen Schofield smoking (R. 363, 368). When Nichols replied in the affirmative, Hopwood said, "Well, I just want you to remember that." (R. 368–370, 86.) All three of the employees in the locker room had been smoking (R. 82, 388), and had been standing close together when Hopwood entered (R. 82, 96, 387); nevertheless, Hopwood testified that he did not see either of the other two smoking (R. 362, 367). While Hopwood asked Nichols whether Schofield had been smoking (R. 368), he did not inquire of Schofield whether the other two had done so (R. 368–369). Their presence in the locker room at that time of day might have indicated their purpose, but, as Hopwood testified, "if I don't see a person smoking they are not smoking as far as I am concerned" (R. 369). This disinterested attitude coincides fully with respondent's general laxity

[43] Hopwood testified that he did not recall having made such a remark (R. 395). Counsel for respondent sought to show that, if such a statement was made, it was merely Hopwood's way of stating that at last he had found Schofield so as to deliver Summersby's summons (R. 394). However, this explanation is inconsistent with the fact that Hopwood had already delivered his message to Schofield at the latter's machine and that it was pursuant to permission by Hopwood that Schofield was in the locker room tidying up for his interview with Summersby (*supra*, p. 67).

in enforcing the rule against smoking (*supra*, pp. 66–67). In selecting Schofield from among three equally guilty employees as the one to be punished, Hopwood, we submit, revealed his true purpose. He knew of Schofield's extensive activities on behalf of the T. W. O. C. (R. 380).

While Schofield was waiting to see Summersby in response to the latter's summons, Vice-president Pawson informed Summersby that Schofield had violated the rule against smoking (R. 464). Hopwood, who therefore had himself determined upon and imposed the moderate discipline meted out to those he found smoking (*supra*, p. 67), did not even make a recommendation concerning the penalty Schofield was to suffer (R. 372–373). Summersby refused to tell Schofield the purpose of his summons to the office prior to the smoking incident, and immediately discharged him (R. 83, 10, 18, 293, 465).[44]

It passes belief, in view of Summersby's other activities, that respondent's president meant what

[44] Summersby testified at the hearing that he sent for Schofield in order to resume his discussions with the jiggers' committee which had begun on April 2 (R. 464; *supra*, pp. 21–22. However, it does not appear that any other members of the committee were summoned on April 6 and it should be noted that on the day previous to Schofield's discharge Summersby had conferred with three representatives of the jiggers, yet did not summon Schofield to that conference (R. 184–187). Indeed, on April 6, Summersby had already launched the Federation (*supra*, pp. 23–26), and it is unlikely that he would have engaged in collective bargaining not carried on by the employees through the instrumentality he had chosen for them.

he said when, in discharging Schofield, he termed the occurrence "unfortunate" in that it took place just when Schofield was "organizing the C. I. O." (R. 465). The Board was plainly warranted in concluding that Schofield would not have been discharged had not respondent been anxious to rid itself of the only leader of the T. W. O. C. drive remaining after Nelson's elimination.

B. THE BOARD'S ORDER OF REINSTATEMENT WITH BACK PAY SHOULD HAVE BEEN ENFORCED

The court below (R. 688–689) apparently accepted the contention of respondent that, even if the discharges of Nelson and Schofield were discriminatory and in violation of Section 8 (1) and (3) of the Act, the reinstatement and back-pay provisions normally applied to remedy such unfair labor practices do not, in the circumstances of this case, effectuate the policies of the Act (Section 10 (c)). The court relied upon evidence assertedly showing that Nelson and Schofield on April 8 unsuccessfully sought to promote a sit-down strike among respondent's employees; on the basis of this evidence, the court declared that the decision in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, was fully applicable and prevented their reinstatement (R. 688). An examination of the evidence, however, discloses that it did not implicate Schofield at all and that even if credited, it is insufficient to bring this case within the *Fansteel* case.

The only proof concerning the alleged efforts by Nelson to promote a sit-down strike is the testimony of the driver of respondent's refuse truck and his helper. Ballato, the driver, testified that on April 8 Nelson tried to persuade him to stop work and engaged in squatting motions, waving his hands (R. 418–419) and that this activity took place on a public road and "if anybody was looking out the east door [of the plant] they could see him" (R. 420). Ballato testified that Schofield did not take part in the motioning (R. 419). Ventry, Ballato's helper, testified that Nelson "stopped us on the road and told us to make a sit-down strike" (R. 421). After contradicting Ballato by testifying that he did not see either Nelson or Schofield waving their hands (R. 421), Ventry stated that Nelson "made a motion to sit down" (R. 422). Ventry disagreed with Ballato in regard to the part of the plant nearest Nelson's alleged gymnastics; he thought it was the "south side of the plant" and that if any of the workers had been looking out "it was very clear to see" Nelson (R. 422). Neither Ballato nor Ventry attached sufficient importance to the incident to report it to their superiors (R. 420, 422). There is no evidence that any of the plant employees saw Nelson's motioning.

Such activity, even if engaged in by Nelson, surely was but a hopeless gesture. Salerno, state director of the T. W. O. C., had given strict orders

that a strike should be avoided at all costs (R. 291–292, 305; compare R. 307, 328–329), and respondent had already herded its employees into the Federation. Nelson's motioning, under the circumstances, clearly constituted no real threat to respondent. The lack of seriousness with which respondent took the "threat" of a sit-down strike is shown by Vice-president Pawson's kindly treatment of Rhodes, who ran through the plant urging the employees to "sit down" (*supra*, note 16, pp. 27–28). Rhodes' action were those of a distracted person, as Pawson testified (*ibid.*), and not a shred of evidence was offered to establish any connection between his activities and those of Nelson or Schofield (R. 423–424). No strike, sit-down or otherwise, occurred, and no damage whatsoever was done to any property of respondent.

Some misconduct is the almost inevitable, though unfortunate accompaniment of labor disputes brought about by the denial to employees of the rights of self-organization and collective bargaining. The Circuit Courts of Appeals have wisely rejected efforts by employers to extend the *Fansteel* case to every type of employee misconduct. *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3d), certiorari denied, No. 418, this Term; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6th); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A.

3rd), petition for certiorari pending, No. 707, this Term. See also Note, *Employee Misconduct Under the Wagner Act: Developments Since the Fansteel Case,* 39 Columbia Law Review 1369. Such caution is necessary if the Board is not to be turned, contrary to the intent of Congress,[15] into a police court for the trial of minor offenses by employees, with consequent inability to investigate, prevent, and remedy the unfair labor practices by employers which are prime causes of industrial strife and its attendant disturbances. The correction and prevention of such employee misconduct, as the cited decisions recognize, was intended by Congress to be left to other statutes and other tribunals with the full realization that existing sanctions were sufficient. The conduct in which Nelson assertedly engaged is inconsequential in comparison with the conduct of the employees whose reinstatement was approved in the three cases cited and in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, and *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646.

The reinstatement and back pay remedies here applied by the Board are the only ones which can effectively undo the coercive results of respondent's

[15] Senate Report No. 573, 74th Cong., 1st Sess., pp. 16-17; House Report No. 1147, 74th Cong., 1st Sess., p. 16.

discriminatory discharges. It flies in the teeth of the policy of the Act to contend that the Board must withhold these remedies under the circumstances of this case. The Act is designed to prevent strikes, including those of the sit-down variety, by fostering genuine collective bargaining, not by penalizing a persecuted employee whose bitterness may have led him to attempt to meet illegality with illegality. Surely the Board, in requiring the reinstatement of the two employees with back pay, did not abuse its "judgment and discretion" to determine, "upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. These provisions of the order are fully appropriate and should have been enforced. *National Labor Relations Board* v. *Newport News Shipbuilding and Drydock Co.*, No. 20, this Term, decided December 4, 1939; *National Labor Relations Board* v. *Falk Corporation*, No. 460, this Term, decided January 2, 1940.[47]

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[46] After Nelson's discharge, Summersby was instrumental in bringing about Nelson's arrest for posting C. I. O. posters on trees with the permission of those on whose premises the trees were located (R. 143-145, 516). Summersby himself tore some of the posters down (R. 143).

[47] Respondent also contended in the court below that Nelson threatened to blow up a railway spur leading to

Respondent attempted to show before the Board that, even assuming Nelson had not been discharged in April, he nevertheless would have been laid off subsequently. It submitted evidence by affidavit (R. 666–667), pursuant to leave granted by the court below (R. 666–667, 675–676), to the effect that in September and December 1937 four carpenters were laid off by respondent for lack of work, and that the remaining seven carpenters were all senior to Nelson in length of service (R. 667–674). The Board on the basis of this evidence made supplemental findings pursuant to Section 10 (e) of the Act (R. 675–677). Specifically, the Board found that if Nelson had not been discriminatorily discharged in April 1937, and if respondent's staff of carpenters had been reduced strictly in accordance with a policy of seniority, Nelson would have been laid off on September 17, 1937; but it also found that no showing whatsoever had been made that "respondent customarily followed a settled and well-defined principle of seniority in lay-offs occasioned by a reduction in force. In fact, no proof was

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the plant and intimidated employees to join the T. W. O. C. The testimony on which these assertions are based is not credible (see R. 250–253, 256, 350–351). Nelson, moreover, categorically denied having made any such threats (R. 153–154). In addition, these alleged threats by Nelson, even if they had been made, were not raised before the Board as ground for a denial of reinstatement (see R. 625) and, accordingly, could not be raised for the first time in the court below (Section 10 (e)).

offered concerning the considerations which govern such lay-offs" (R. 676–677). The Board was, consequently, unable to conclude that Nelson would have been laid off in September 1937 (R. 677). These findings are clearly correct. Nelson's foreman testified that Nelson was "a very good workman" (R. 407), and respondent made no effort to show that merit did not receive greater or equal weight in selecting those to be laid off than did seniority. Plainly, the evidence furnishes no basis for refusing to enforce the Board's order of reinstatement with back pay.

In addition, it should be noted, the question whether Nelson would have been laid off in September 1937 is without significance in the present proceeding. It cannot be contended that the fact sought to be proved would terminate Nelson's status as an employee under Sections 2 (3) and 10 (c) of the Act; therefore, no question of the Board's power to order reinstatement could be involved. The hypothetical lay-off in September 1937 bears only upon (1) the amount of back pay to which Nelson will be entitled, upon his reinstatement, and (2) Nelson's right to be retained after he has been reinstated. If, as respondent claims, Nelson would have been laid off, "the losses of pay" he has suffered as a result of respondent's illegal discrimination are reduced accordingly. And even after complying with the reinstatement order, re-

spondent will be free to reduce its staff on any nondiscriminatory basis as the exigencies of its business require. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. The question raised by respondent is relevant only to the extent of the compliance required after reinstatement, not to the validity of the order rendered by the board. It is, therefore, not pertinent in this proceeding. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541, certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th); *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d), certiorari denied, No. 418, this Term; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, No. 105, this Term.

The resolution, in a proceeding for enforcement or review of a Board order, of questions concerning the extent of the action required to comply with the portions of the order held valid, would involve repeated, and perhaps endless, remands to the Board for the purpose of adducing additional evidence. The question which respondent raises, for example, could not be disposed of on the record made in this case; at any time since the additional evidence was adduced during 1938, some or all of the carpenters laid off in September and December of 1937 may have been recalled. It might appear that Nelson, had he been laid off in September, would have thereafter resumed work. Similarly, changing wage rates, affecting the amounts of back pay provided, would necessitate repeated remands, as would the determination of earnings subsequent to discharge, which are deductible from the amounts to be paid. If a proceeding involving the reinstatement of employees is not to become "a merry-go-round" (*International Association of Machinists* v. *National Labor Relations Board*, decided November 20, 1939 (App. D. C.)), questions relating to the extent of compliance must be left to adjustment, by agreement of the parties or in supplemental proceedings, after the validity of the order has been determined and its enforcement decreed.

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed, and the cause remanded with directions to grant the order of the Board full enforcement.

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MARCH 1940.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. IV, sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be

established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the ap-

propriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

Circular (Board Exhibit 19):

TO ALL B. D. A. EMPLOYEES:

If the B. D. A. should become 51% organized under the Federation of Labor or the C. I. O. or any other Union, it means that such a Union becomes sole bargaining agent for every person employed in the B. D. A.

If the C. I. O. were able to eventually organize this plant it would mean their paid operators would come in and give us orders that could seriously affect our lives and we would have no alternative, whereas if we have our own Federation we ourselves, right here, can decide when and how we want to work.

Just because an outside Union, such as C. I. O., or the American Federation of Labor, conducts a strike in some other finishing plant that may be 100 miles or more away from us is no reason why we should be required to leave our work and go out in sympathy.

Two years ago when there were strikes in Woonsocket, Saylesville, and in the Providence section we were able to keep on working and continue to receive our pay and support our families, whereas if we had been members of an outside Union we would have been ordered out of our jobs and required to loaf and suffer as those paid organizers made people suffer and lose money in those other plants—and what did they get after losing their work?—nothing at all, except loss of pay.

By having our own Union here and become 51% organized ourselves we can direct

our own lives and tell the management how and when we want to work, and keep our dues here to build up a sick benefit fund for ourselves, instead of paying our money to outside organizers who are interested only in getting those dues from us and don't care how our bills pile up when they pull us out in sympathy with some other plant.

We don't want that; we want to organize ourselves 100% against such a thing right now and have our own Union here, the sole bargaining agent with the management.

The management itself is not interested and not inclined to bargain with outside agitators, but the management is interested in looking out for the welfare of its own employees here and keeping us employed with better pay than any other finishing works of its kind in the United States.

Look how the C. I. O. has already let down the people at Kenyon. Why didn't they insist that Kenyon pay as much to their people as is paid in B. D. A.? They let them down because all they were interested in was getting the memberships signed up and get dues coming in, and that's all they are interested in everywhere, and everyone knows it.

The people in Bradford have suffered before by being exploited by outside Unions, and let us make sure it doesn't happen again.

Let us get organized ourselves immediately so that we can be our own bargaining agency with the management and the management will be in sympathy with such a plan, for they know it is for our mutual good.

(Signed) COMMITTEE FOR ORGANIZATION OF THE B. D. A. EMPLOYEES' FEDERATION.

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